NO. 12944

United States
Court of Appeals
for the Ninth Circuit

McNAIR REALTY COMPANY, a Corporation,
Appellant,

vs.

GAMBLE-SKOGMO, INC., a Corporation,
Appellee,

GAMBLE-SKOGMO, INC., a Corporation,
Appellant,

vs.

McNAIR REALTY COMPANY, a Corporation,
Appellee,

Appeal from the United States District Court for the District of Montana

BRIEF OF GAMBLE-SKOGMO, INC., a Corporation, Appellant

APPEARANCES:

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JURISDICTION

The Jurisdiction of the case was in the District Court because the plaintiff, Gamble-Skogmo, Inc., is a Delaware corporation, and the defendant, McNair Realty Co., is a Montana corporation. The amount in controversey exceeds, exclusive of interest and cost, the sum of THREE THOUSAND AND NO/100 DOLLARS ($3,000.00). The statutory provision believed to sustain the jurisdiction of the District Court is 62 Stat. 930, Title 28 U.S.C.A. Sec. 1332. The pleadings necessary to show the existence of the jurisdiction in the District Court are set out in Paragraph I of the plaintiff's Complaint. (R 3)

The action was one for declaratory relief under 62 Stat. 964 as amended May 24, 1949 c. 139, Sec. 111, 63 Stat. 105, Title 28 U.S.C.A. Sec. 2201. Plaintiff, as lessee, and defendant, as lessor, entered into a written lease on December 27, 1943 for a one story building and basement located in Great Falls, Cascade County, Montana. Thereafter and prior to October 3, 1949, the defendant claimed that the plaintiff was in default of certain provisions in the written lease pertaining to the payment of rent and to the covenant of the plaintiff to furnish accountings to the defendant. On October 3, 1949, the defendant sent a letter to the plaintiff purporting to terminate said written lease. The plaintiff denied that the written lease was terminated. On October 10, 1949, the defendant demanded possession of

the leased premises from the plaintiff, which demand was refused. On November 1, 1949, the plaintiff filed a complaint against the defendant setting forth controversies and praying for a declaration of the plaintiff's rights and other legal relations under the written lease and facts hereinabove set forth. (R 3-25)

It is contended that this Court has jurisdiction under 62 Stat. 929, 28 U.S.C.A. Sec. 1291, and under 63 Stat. 105, 28 U.S.C.A. Sec. 2201. This appeal is from part of a judgment of the United States District Court for the District of Montana which judgment was filed and entered on March 14, 1951. (R 58-60)

A Notice of Appeal was filed by the defendant, McNair Realty Co., from a part of the judgment on April 2, 1951. (R 60 & 61) The Notice of Cross-Appeal from part of the judgment was filed by the plaintiff, Gamble-Skogmo, Inc., on April 13, 1951, (R 63 & 64) It is this cross-appeal with which we are here concerned in this Brief. An Undertaking on Cross-Appeal was also filed on April 13, 1951 by Gamble-Skogmo, Inc., the plaintiff. (R 64 & 65) On April 17, 1951, the plaintiff, Gamble-Skogmo, Inc., filed a Designation of Points to be Relied Upon the Cross-Appeal. (R 70-73) This Designation of Points was adopted for the cross-appeal before this Court, and was filed in this Court on June 4, 1951. (R 371 & 372)

STATEMENT OF THE CASE

This is a suit for declaratory relief in which the plaintiff seeks to have its rights and other legal relations determined pertaining to a written lease and certain efforts of the defendant to terminate that lease. The written lease in question is dated December 27, 1943, and was entered into between Gamble-Skogmo, Inc., a Corporation, as lessee, and McNair Realty Co., as lessor. There is no dispute about the execution, and the wording of the lease which is set forth in plaintiff's Complaint as Exhibit A. (R 9-23)

Since this action involves an appeal by McNair Realty Co., defendant below, and a cross-appeal by Gamble-Skogmo, Inc., the plaintiff below, in this brief was shall try to avoid confusion by referring to the parties under the same designation that they had in the District Court as plaintiff and defendant.

Plaintiff is a Delaware Corporation, having its principal office and place of business in Minneapolis, Minnesota, and is engaged generally in the merchandising business. Defendant is a Montana corporation, having its principal office and place of business in Great Falls, Montana, and is engaged generally in the real estate business. Defendant was and is the owner of the premises leased under the written lease of December 27, 1943. These premises consist of a one-story building and basement, located at 521-523-525 Central Avenue in Great Falls, Montana, and used during the existence

of the lease by the plaintiff as a store. These premises will be hereinafter referred to as the department store to distinguish them from other premises.

The lease of December 27, 1943, provided that the plaintiff should take possession of the department store premises as of March 1, 1944. On, or soon after that date, the plaintiff went into possession of the department store premises and commenced operation of the same as a department store. The plaintiff remained in possession of the department store premises at all times up to and including the time of the trial.

When the plaintiff first took possession of the department store premises, the plaintiff used the premises only for the sale of general department store merchandise described in their records as Unit 1. During the year 1946, plaintiff started to operate a lunch counter on the department store premises which is described in the plaintiff's record as Unit 2. In January of 1947, the plaintiff also started to operate a farm store in the city of Great Falls, Montana, which is identified on the plaintiff's records as Unit 5. Part of the farm store, or Unit 5, activities occurred in the department store premises, and part occurred on other premises not connected wtih the lease of December 27, 1943. The question as to whether or not the sales of farm store items are within the provisions of the lease of December 27, 1943, is one of the principal issues of this Appeal.

The lease of December 27, 1943 was characterized by both plaintiff and defendant as "a percentage lease." It provides for a minimum base rental of $5,400.00 per year payable monthly in advance. There is no contention between the plaintiff and defendant as to these monthly minimum rental payments. However, one of the principal issues concerns the interpretation of the percentage clause in the lease which provides that the plaintiff as lessor, shall also pay to the defendant as lessee:

> "**Two percent (2%) on all net retail sales over Two Hundred Seventy Thousand and No/100 Dollars $270,000.00) per lease year, had and obtained on the above-described premises.** No percentage will be paid on wholesale sales to employees or sales or transfers of merchandise to other Gamble Stores.
>
> Should lessee develop a general wholesale business on these premises, then one per cent (1%) on such general wholesale sales will be paid to the lessor. Additional rental on the above is to be paid on a quarterly accounting, based on annual net retail sales of Two Hundred Seventy Thousand and No/100 Dollars ($270,000.00) or on any general wholesale business done as provided for." (R 10 & 11), (Emphasis supplied)

The lease year started March 1st of each year and terminated on the last day of February of the following year, with the first lease year beginning March 1, 1944. During the first two lease years the plaintiff did not make net retail sales over Two Hundred Seventy Thousand and No/100 Dollars ($270,000.00) and consequently did not pay any rental under the percentage clause. (R 227 & 233)

In 1946 the department store premises were remodeled and improved. Chester McNair, the President of the defendant corporation, testified that a primary reason for the remodeling was to attract more customers for retail sales. (R 318) During the third lease year, the plaintiff expended the sum of $29,342.46 for remodeling and improvements. (R 100) At the same time, the plaintiff expended the sum of $87,107.99 putting the new fixtures in the department store. (R 102) After these expenditures on the part of the plaintiff were made, the net retail sales increased and the plaintiff paid the defendant the rental payments under the percentage clause of the lease of December 27, 1943. The store records disclosed that the net retail sales for the third lease year was the total sum of $567,737.86 and that the plaintiff paid the total rent of $11,354.76. (R 97 During the fourth lease year, the store records show that the net retail sales to have been $588,309.90 and the plaintiff paid the rental of $11,766.20. (R 98) During the fifth lease year, the records disclosed total net retail sales of $703,402.77, and the plaintiff paid a total rent of $14,068.00. (R 98) The trial occurred during the sixth lease year, but the records were complete for the first nine months of that lease year, through November 30, 1949. The store records disclose that during that period of time, the total retail sales were $469,422.33 and the total rent paid for that period was the sum of $9,111.80. (R 99)

There is no dispute that the plaintiff reported the above net retail sales, and paid the 2% rental on any excess of the reported net retail sales over the figure of $270,000.00 annually. However, one of the issues of this cross-appeal involves the contention made by the defendants, and opposed by the plaintiff, that the plaintiff made certain net retail sales which were "had and obtained" on the leased premises, which were not included in the report of total net retail sales, and upon which the 2% was never paid. The sales in dispute were the sales of farm implements and equipment. Plaintiff admits that it has not included the sales of farm implements and equipment in its quarterly or annual reports to the defendant, and that it has not paid the 2% rental upon such sales. Plaintiff contends that such sales were not within the terms of the lease as they were not "had and obtained" on the demised premises in that such sales were made on two or more other premises leased by the plaintiff and operated as a farm store.

At the time the lease of December 27, 1943 was entered into, the plaintiff was not in the business of selling farm implements and equipment either in Great Falls or elsewhere in the United States. (R 166 and 167) During the year 1946, the plaintiff started setting up farm stores throughout the United States. As of the date of the trial, the plaintiff has installed eighteen such farm stores, including the one at Great Falls, Montana. In general,

the plaintiff had set these stores up as separate stores and had paid rent upon them upon a flat rental basis rather than a percentage basis. (R 168 & 169)

During the year 1946 the plaintiff made arrangements to start a farm store in Great Falls, Montana. The farm store was set up to sell, and ultimately sold heavy farm implements and equipment such as tractors, combines, mowing machines, rakes, and the necessary parts for such equipment. These items are carried on the books and store records of the plaintiff designated as Unit 5. It was almost a physical impossibility to set up the farm store in the department store building. The doors and other facilities were so small that it would have been impossible to move such large and heavy items in and out of the department store building without taking them apart and moving them piecemeal. (R 170) Therefore, the plaintiff made arrangements, and ultimately leased several other properties in Great Falls, Montana for the storage and display of farm implements and equipment. Starting January, 1947, the plaintiff started the sale of farm implements and equipment which were stored and displayed at the two other premises. One of the premises so leased was a warehouse and a lot located immediately across the alley to the North of the department store. Part of the farm implements and equipment were stored and sold on the premises, which will be hereafter referred to for the

sake of convenience as the farm store. It so happened that these farm store premises were also owned by the defendant, although the premises themselves are not leased under the written lease of December 27, 1943. In its operation of a farm store, the plaintiff also leased a building from the Roy Anderson Company. This building was located approximately two miles from the department store and was also used for the storage and display of farm implements and equipment. (R 83-85) For the sake of convenience, these premises will be hereinafter referred to as the Anderson warehouse.

Part of the activities involved in the sale of farm implements and equipment was carried on at the Anderson warehouse. Part of the activities involved in the sale of farm implements and equipment was carried on at the farm store, and part of the activities involved in such sales were carried on in the department store. It is the plaintiff's contention that not enough of those activities were carried on on the department store premises so that the sale of farm equipment came within the provisions of the percentage rental in the lease as being "had and obtained" on the demised premises.

A discussion of what activities were carried on on the department store premises and what activities went on elsewhere on the two other leased premises will be set forth later in this Brief under ARGUMENT.

The District Court made a Finding of Fact that

the sales made by the farm store were had and obtained upon the demised premises and that the plaintiff was obligated to pay defendant 2% on such sales. (R 49-55) The District Court also made a Conclusion of Law as follows:

I.

"The defendant, McNair Realty Company, a Corporation, is entitled to a judgment and declaration of this Court that the plaintiff, Gamble-Skogmo, Inc., a Corporation, is indebted to the defendant in the sum of $5,177.70 as unpaid rental for the periods set forth in Finding of Fact No. VI, together with interest upon such unpaid rental at the rate of 6% per annum from the dates upon which such rentals became due, making a total of $5,931.18" (R 55 & 56)

The District Court also made a Conclusion of Law to the effect that the plaintiff was in default with respect to the covenant contained in the lease relating to the payment of rental and to the quarterly accounting, and that the defendant was entitled to the immediate possession of the premises unless the plaintiff should pay the defendant within fifteen days after the entry of the Findings and Conclusions, the sum of $5,931.18 plus the costs of the action. (R 56) The Findings of Fact and Conclusions of Law were filed January 24, 1951. Thereafter, on the 6th day of March, 1951, tender of the above sums were made to the defendant which proper tender was acknowledged and refused. (R 66) On March 14, 1951 the District Court filed and entered its judgment. (R 60) That judgment de-

creed that by virtue of the tender on March 6, 1951 plaintiff was relieved from the termination and forfeiture of said lease. On April 2, 1951, the defendant filed its notice of appeal from that portion of the judgment whereby the plaintiff was relieved from the termination and forfeiture by virtue of the said tender. We understand that we are not permitted to and shall not deal with that issue on this cross-appeal.

Thereafter, on the 13th day of April, 1951, the plaintiff filed its Notice of Cross-Appeal in which the plaintiff appealed from that portion of the judgment which decreed that the plaintiff was in default in respect to the covenants in the lease relating to the payment of rental, and to the quarterly accounting to be made to the defendant covering net retail sales. (R 63) The plaintiff also appealed from that portion of the judgment which decreed that the defendant was entitled to possession of the leased premises of October 10, 1949, and that the defendant was entitled to recover the defendants costs in the action below. The appeal was made from these portions of the decree as a necessary corollary to the principal issue of whether or not the plaintiff was in default of the covenants in the lease relating to the payment of a percentage rental on farm store sales.

On April 17, 1951, plaintiff filed it's Designation of Points to be Relied Upon on Cross-Appeal. (R 70-71) Most of the points therein designated, are

concerned with the principal issue of this cross-appeal hereinabove discussed, as to whether or not the plaintiff was in default of the percentage rental provision of the lease of December 27, 1943. These points may be identified in the Designation of Points to be Relied Upon on Cross-Appeal as numbers 1, 2, 3, 4, 5, 6, and 10.

Another question raised in this cross-appeal involves certain negotiations which took place between the plaintiff and the defendant from October 24 to October 28, 1949. When evidence of these negotiations were introduced at the time of the trial, we, as Counsel for the plaintiff, objected to the testimony upon the grounds that the negotiations were of a compromise nature and not properly admitted as evidence. (R 298 et seq.) Testimony on the same negotiations also was introduced by the plaintiff. (R 198 et seq.) The District Court allowed the evidence to be taken, subject to objection, and stated it's opinion that all of the evidence relating to this subject should be excluded from the case, "and that such is the order of Court herein." (R 36) The plaintiff's contention is that certain of that evidence was to the effect that a tender was made by the plaintiff to the defendant during those negotiations which entitled the plaintiff to relief from forfeiture of the lease. This issue is presented in numbers 7, 9, and 10 of the Designation of Points to be Relied Upon on Cross-Appeal. (R 71 and 72)

Another question raised in this cross-appeal is

whether or not the defendant waived it's right, if any existed, to the percentage rental on the sale of farm store items and whether or not the defendant waived it's right, if any existed, to declare a termination of the lease. Plaintiff contended in the District Court that there were such waivers. The facts surrounding such waivers are generally in dispute, and for the sake of brevity will be set forth at length under ARGUMENT below. The District Court made the Finding of Fact No. IX to the effect:

> "The defendant has not waived the defaults of the plaintiff, aforesaid, and was on October 3, 1949, and at all times thereafter, entitled to terminate said lease by reason thereof." (R 54)

Numbers 13 and 14 of the Designation of Points to be Relied Upon on Cross-Appeal deal with this question.

On April 17, 1951, the plaintiff served and filed it's Designation of Points to be Relied Upon by Appellee and Appellant on Cross-Appeal. (R 70-73 This was adopted for this appeal before this Court of Appeals. (R 371 & 372) The Specifications of Errors below in general are the same as are contained in that Designation of Points to be Relied Upon by Appellee and Appellant on Cross-Appeal, and in general contain the same wording. The only exceptions are that numbers 8 and 11 of the Designation of Points have been ommitted, and that number 9 of the Specifications of Errors requires under the rule of this Court, a statement as to the evidence introduced and objected to.

SPECIFICATIONS OF ERRORS

1. The judgment and decree of the District Court is erroneous insofar as it adjudges that at the time of filing of its complaint, the plaintiff was in default with respect to the covenants contained in the lease of December 27, 1943, relating to the payment of rental and to the quarterly accounting required to be made by the plaintiff to the defendant covering net retail sales made by the plaintiff for the period January 1, 1947, to August 31, 1949.

2. The judgment and decree of the District Court is erroneous insofar as it adjudges that as of December 23, 1949, the plaintiff was indebted to the defendant for unpaid rental in the sum of $5,177.70 in that as of December 23, 1949, the plaintiff did not owe the defendant anything for unpaid rental.

3. The sales of farm machinery and equipment were had and obtained on two other premises other than the demised premises and were not "had and obtained" on the demised premises.

4. By their acts and correspondence, both the plaintiff and the defendant placed a practical construction upon the lease of December 27, 1943, to the effect that sales of farm machinery and equipment were not included within the provisions of the lease of December 27, 1943.

5. The plaintiff was not in default of any of the terms of the lease of December 27, 1943, on the date of October 3, 1949, nor at the time of the filing of the plaintiff's complaint.

6. The judgment and decree of the District Court is erroneous insofar as it adjudges that by reason of certain defaults the defendant was entitled under the terms of the lease to declare the lease terminated on October 3, 1949, and that the defendant was entitled to the possession of the leased premises on October 10, 1949.

7. If the plaintiff is in default under the terms of lease of December 27, 1943, the plaintiff is entitled to relief from forfeiture and termination of that lease, not only by the tender made on March 6, 1951, but also by the tender made during the negotiations from October 24 to October 28, inclusive, in 1949, the tender made in the plaintiff's complaint, and the tender made by the plaintiff's representative during the course of the trial.

8. In addition to the provisions of Section 17-102, Revised Codes of Montana, 1947, plaintiff is also entitled to be relieved from forfeiture in the event of default because the strict enforcement of the forfeiture or termination clause would be unjust, oppressive, and contrary to the general principles of equity.

9. The opinion and order of the District Court is erroneous insofar as it excluded from the case any evidence of a tender of full compensation by the plaintiff to the defendant during the period of time from October 24 to October 28, inclusive, 1949.

Both Mr. Hill as witness for the plaintiff, and

Mr. Chester McNair as a witness for the defendant testified as to a series of negotiations which took place during the period from October 24 to October 28, inclusive, during the year 1949. Objections were made on behalf of the plaintiff to this evidence as on the grounds that it was evidence of a compromise nature. The testimony leading up to such an objection and the objection itself may be quoted as follows:

TESTIMONY OF CHESTER McNAIR

Q. And was there a meeting arranged for between yourself and Mr. Williams?

A. By the next day - - -

Q. And Mr. Hill and myself for the next day?

A. By the next day, you mean - - -

Q. That would be October 25th?

A. It was arranged. We met in your office in the morning.

Q. And briefly the three of you and Mr. Cockayne appeared in the office, did you not?

A. Yes.

Q. And did anyone have a checkbook?

A. I presume it was a checkbook? I didn't examine it sufficiently.

Q. Well, who opened the conversation in my office if you recall?

A. I believe Mr. Williams.

Q. And did he identify himself as being the representative, that is, attorney for the Gamble-Skogmo Company?

A. He identified himself as being counsel for the representative.

Q. And what did he say?

Mr. Williams: If the Court please, at this time I would like to object to this line of testimony on the ground that the evidence shows that these negotiations were of a compromise nature, and evidence of a compromise nature is not properly admitted in evidence.

Mr. William T. Hill testified in effect that during these negotiations from October 24 to October 28, 1949 the plaintiff offered to pay the defendant the sum of $5,161.60, or whatever was the correct figure which would represent 2% on net retail sales of farm machinery. Mr. William T. Hill further testified in effect that the sum of $5,161.60 was offered at a time when the plaintiff's representative had a checkbook and the authority to write a check. The offer was made with the understanding that the old lease of December 27, 1943 would remain in effect. (R 198-204)

Mr. Chester McNair's testimony on the same subject is contained in the Record from pages 297-306, and from pages 339-345, and pages 351-352, all inclusive. Mr. Chester McNair testified in effect that the plaintiff offered the defendant during these negotiations the sum of $5,161.60 which was accepted by the defendant as representing the 2% percentage rental on farm sales to October 19, 1949. Chester McNair further testified that the figure and

the sum were acceptable to the defendant only in the event the lease of December 27, 1943 was terminated. He testified that the plaintiff and the defendant entered into negotiations for a new lease based upon his understanding that the old lease was terminated. (R 297-306). Chester McNair also testified in effect that the defendant would accept the sum of $5,161.60 with no strings attached, but would not accept it if it was made in an offer which involved the old lease remaining in effect. (R 339-345)

The District Court said in its opinion at Page 36 of the Record:

> "The negotiations for a comprise of the difficulties the parties were encountering fills a good part of the transcript in this case; objections were made to the introduction of evidence relating to this attempted compromise, and the evidence was allowed to be taken subject to objection; the court has gone over carefully the evidence of this effort to effect a compromise, which ended in failure, and is now of the opinion that all evidence relating to this subject should be excluded from the case, and such is the order of the Court herein. It would appear from the provisions of the statute and authorities (R.C.M. 1947, 93-2201-3) that evidence of compromise negotiations should not be admitted. Whatever the agreements or disagreements of the parties were in respect to the proposals of compromise, it is in evidence that no settlement occurred. (Hufine v. Lincoln, 53 Mont. 474.) In the strict sense of the word, there does not appear to have been any material independent facts disclosed not having some relation to the negotiations for compromise."

The plaintiff made the original objection, and believes the Court properly excluded the introduction of evidence relating to an attempted compromise. However, if that order is interpreted to exclude the evidence of a tender of full compensation made by the plaintiff to the defendant during the period of compromise negotiations, the plaintiff contends that the order excluding such evidence is erroneous.

10. The judgment and decree of the District Court is erroneous insofar as it adjudges that the defendant have and recover from the plaintiff the defendants costs which were taxed at the amount of $362.25.

11. The defendant waived its rights, if it ever had any, to demand a quarterly accounting on a net retail sales of farm machinery and equipment and to claim a 2% rental on said sales.

12. The defendant waived its rights, if it ever had any, to enforce the forfeiture or termination of the lease of December 27, 1943.

ARGUMENT

SUMMARY

I. The sales of farm implements and equipment do not come within the provision of the lease of December 27, 1943, requiring a rental of 2% on "net retail sales" - - - "had and obtained" - - - on the demised premises.

A. The correct test is whether the farm store as

it was set up did in fact constitute a revenue producing activity which the parties intended should become a basis of calculation of "net retail sales" at the time the lease was entered into.

1. The farm store activities which took place on the demised premises were so few and of such a nature, that they did not affect the income producing activities which the parties intended should become a basis of calculation of "net retail sales."

2. It was physically impossible to operate the farm store on the demised premises.

B. Since December 27, 1943, the parties themselves have placed a practical construction upon the lease to the effect that farm sales are not included within the rental provisions of the lease.

1. The plaintiff has demonstrated its practical construction of the lease in the manner of setting up and operating the farm store.

2. The defendant has acceded to plaintiff's construction by its permission of the plaintiff's act, and by the interchange of letters relating to the lease of the farm store premises.

II. If the plaintiff is in default under the terms of the lease of December 27, 1943, the plaintiff is entitled to relief from forfeiture and termination of that lease, not only by the tender made on March 6, 1951, but also by the tender made during the negotiations from October 24th to October 28th, inclusive, in 1949, the tender made in the plaintiff's complaint, and the tender made by the plaintiff's

representative during the course of the trial.

A. Section 17-102 Revised Codes of Montana, 1947, applies to this case.

B. The general principals of equity require such a relief from forfeiture.

III. The defendant has waived its right, if ever it had any, to claim a 2% rental on farm store sales.

A. Defendant continued to cash the percentage rental checks, and the other monthly rental checks after defendant had knowledge that the farm store sales were not included.

B. The defendant continued to rent the property to the plaintiff on which the farm store sales were made after the defendant had knowledge that it was not receiving a 2% rental on such sales.

IV. The defendant has waived its right, if it ever had any, to claim a termination and forfeiture of the lease of December 27, 1943:

A. The defendant continued to accept and cash all rental checks after it had knowledge that farm store sales were not included. Of special importance is the fact that the defendant accepted and cashed the check of October 3, 1949.

B. The defendant continued to lease the property to the plaintiff on which the farm store sales were made after the defendant had knowledge that it was not receiving 2% rental on such sales.

C. Plaintiff demanded a percentage rental on farm store sales up to the date of October 19, 1949, which could only be owing in the event the lease of December 27, 1943 was still in effect as

of October 19, 1949.

I.THE SALES OF FARM IMPLEMENTS AND EQUIPMENT DOES NOT COME WITHIN THE PROVISION OF THE LEASE OF DECEMBER 27, 1943, REQUIRING A RENTAL OF 2 PER CENT ON "NET RETAIL SALES - - - HAD AND OBTAINED" ON THE DEMISED PREMISES. (Specification of Errors, numbers 1, 2, 3, 4, 5, 6 and 10.)

A. THE CORRECT TEST IS WHETHER THE FARM STORE AS IT WAS SET UP DID, IN FACT, CONSTITUTE A REVENUE PRODUCING ACTIVITY, WHICH THE PARTIES INTENDED SHOULD BECOME A BASIS OF CALCULATION OF "NET RETAIL SALES" AT THE TIME THE LEASE WAS ENTERED INTO.

1. THE FARM STORE ACTIVITIES WHICH TOOK PLACE ON THE DEMISED PREMISES WERE SO FEW AND OF SUCH A NATURE THAT THEY DID NOT AFFECT THE INCOME PRODUCING ACTIVITIES WHICH THE PARTIES INTENDED SHOULD BECOME A BASIS OF CALCULATION OF "NET RETAIL SALES".

The lease of December 27, 1943, provides in part that the rental for the demised premises shall be:

"-------- at the rate of FIFTY-FOUR HUNDRED and no/100 Dollars ($5400.00) per annum payable in equal monthly installments of $450.00 each in advance on the first day of every month during said term beginning with the first day of March, 1944, **plus two per cent (2%) on all net retail sales** over TWO HUNDRED SEVENTY THOUSAND and no/100 Dollars ($270,000.00)

per lease year, **had and obtained on the above described premises.** --------"

(Emphasis supplied) (R 10)

As we have heretofore discussed, the plaintiff started the operation of a farm store in Great Falls, Montana, in January, 1947. That farm store sold farm implements, equipment and parts which were known and described in the Gambles Store records as Unit 5. For this purpose, the plaintiff had leased several different premises. One of these premises was a warehouse located approximately two miles from the department store and leased by the plaintiff from a third party. Another of these premises was a lot and warehouse between First Alley North and First Avenue North leased by the plaintiff from the defendant and designated in this brief as the Farm Store.

The normal procedure for the sale of farm equipment is set forth in the Record at page 144 et seq. In general, the farm equipment and parts were stored, assembled, and displayed at one or the other of these other two properties. These other premises were under the control and management of the farm store manager, Alvin Hunt, who hired and fired the salesmen working under him, ordered new merchandise, supervised repairs, and performed the other necessary duties in the management of a store on those premises. The farm store salesmen worked from these premises and displayed their farm equipment and parts on these premises or took them from these other premises to the farms

for the purpose of demonstration. In the event of a cash sale the sales slip was written either on these premises or at the purchaser's place of business, or farm, and the cash or check was received at the same time. Both the department store manager and the farm store manager testified that in the normal sale none of the proceedings ever took place in the department store until the sale was completed. (R 87, 88, and 149) On all such cash transactions we submit that there is no question but that the title to the propery sold passed elsewhere than on the department store premises (Sec. 67-1703, Revised Codes of Montana, 1947).

Contract sales were handled much the same way except that the business office in the department store handled the necessary paper work and checked the credit rating of the prospective purchaser. The contract sales amounted to 2.21 per cent of the total farm sales. (R 91) In addition this same business office also received the sales slips on farm sales after the sale was completed, received the money and did the general accounting for the department store. In this connection, we feel it pertinent to point out that the business office occupied approximately 300 square feet out of a total of 20,000 square feet in the department store. (R 136)

There was considerable evidence back and forth as to the different activities performed on or off the department store premises in connection with the operation of the farm store. Much of this evi-

dence was not concerned with where the sales of farm equipment and parts took place, but with the advertising, bookkeeping, management, where the letters were mailed, and so forth.

The general principle with which we are here concerned is a common one in the interpretation of contracts and has been codified in Montana as Section 13-702 of the Revised Codes of Montana, 1947:

> "**Contracts—How to Be Interpreted.** A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

There is an exhaustive annotation on the construction of percentage leases in 170 A.L.R., beginning at Page 1113. The general rule above quoted is stated more specifically in its application to percentage leases in 170 A.L.R., at Page 1130, as follows:

> "2. Determination of gross income. There is no rule, formula, or generalization, under the rules of law or accounting practice, which by itself determines what constitutes gross income for purposes of calculating rent under a percentage lease. The parties are free, for the most part, to stipulate respecting the matter, and their stipulations must be construed in the same reasonable manner as other leases. It will be found, however, that regard is in most instances had for what, in fact, **constitutes a revenue-producing activity which the parties intended should become a basis of calculation.**"

To the same effect are: (Garden Suburbs Golf

and Country Club, Inc. v. Frank O. Pruitt, 156 Fla. 825, 170 A.L.R. 1107, 24 So. (2d) 898; Selber Bros v. Newstadt's Shoe Stores, (1940) 194 La 654, 194 So. 579; Herbert's Laurel-Ventura vs. Laurel-Ventura Holding Corp. (1943) 58 Cal. App. (2d), 138 Pac. (2d) (43)

We submit that the Court is faced with the problem of determining the intention of the contracting parties as of December 27, 1943, in view of the circumstances which ultimately developed as presented by the evidence here. We submit that an examination of all of the evidence justifies the finding of the following intentions of the contracting parties as of the date the contract was entered into:

1. The plaintiff did not have and did not contemplate starting a farm store in Great Falls, Montana, so that there was no specific intent.

2. The intention was not to prohibit the plaintiff from starting other operations in Great Falls, Montana. The evidence shows that there was no attempt by the defendant to prohibit the plaintiff from starting its farm store. In fact, the defendant tried to obtain additional premises to rent to the plaintiff for use as a farm store.

3. The intention of the contracting parties was that if any new operations were started by the plaintiff, those operations should be performed on the premises if possible. (However, the evidence showed that it was physically impossible to operate the farm store upon the department store premises.)

4. The intention of the contracting parties was that if the plaintiff started an operation which it was not possible to put into the department store, the plaintiff should not remove any of the revenue from the department store and should not compete with the department store, so as to decrease the net retail sales. In this connection, the plaintiff should not sell in its new store any items sold by the department store. (The defendant failed to show where the plaintiff removed any revenue or competed in any manner with the department store, in its operation of the farm store. Such evidence as was introduced was to the effect that the department store items and the farm store items were entirely separate and non-competitive) (R 145)

5. If the plaintiff starts a new operation which it is impossible to operate from the department store premises, there still should be a degree of separation. In determining what degree of separation is required, we must assume that as of December 27, 1943, the officers of the defendant were reasonable men and would require only that degree of separation which would assure them that their own revenue on the percentage of net retail sales was not decreased. We cannot assume that they intended a degree of separation which would place an increased burden upon the plaintiff although it would not benefit the defendant. Here it is significant that with all the means of discovery available to the defendant which are afforded by the Federal

Rules, the defendant has submitted no evidence that the farm store in any manner decreased the net retail sales on the department store premises. Rather, all of the claims of the officers of the defendant have been to the effect that here is some additional revenue that we would like to get our hands on.

We realize that the District Court made a Finding of Fact that the sales made by the farm store were had and obtained upon the demised premises. In fact, the District Court listed various activities of the farm store, which took place on the department store premises. It would be possible for us at this time to list an equally lengthy number of activities which took place off the department store premises. We are of the opinion that this listing of various activities would be of little value unless there was some test used to determine whether or not the activities listed were pertinent to the question involved. We submit that an examination of the farm store activities listed by the District Court on Pages 49, 50 and 51 of the Record will prove that those activities had little or nothing to do with the revenue producing activities which the parties must have had in mind at the time of the execution of the lease. We further submit that an examination of all of the farm store activities will reveal that the farm store sales are not the "net retail sales" on which the defendant could reasonably have expected to receive a percentage.

2. IT WAS PHYSICALLY IMPOSSIBLE TO OPERATE THE FARM STORE ON THE DEMISED PREMISES.

Undoubtedly, the above argument would have less validity if it had been possible for the plaintiff to operate its farm store on the demised premises. All of the evidence by the plaintiff was to the effect that it was physically impossible to sell farm machinery and equipment such as tractors and combines upon the department store premises. (R 84, 85, and 148) In this connection Dale Cockayne testified as follows: (R 84)

"Q. Has it ever been possible for a prospective purchaser to examine any of the merchandise sold by your farm store on the department store premises at 521, 523 and 525 Central Avenue?

A. No, it hasn't. It would, of course, be impossible to get those items inside the store; not impossible but improbable. You could get them in if you tore them all down and set them back up again."

We know of no contradictory evidence by the defendant. We know of no contention by the defendant that the farm store could have been operated upon the demised premises. We know of no showing by the defendant and of no contention to the effect that the farm store operations decreased the net retail sales actually made upon the department store premises. Under these circumstances, the defendant is reduced to the following

dog-in-the manger argument:

"You, the plaintiff, lease a department store building from us at 521-523-525 Central Avenue. It is true that the department store building is not suitable for the operation of a farm store and that it would be practically impossible to sell and display such things as tractors and combines on those premises. It is true that the operation of a farm store upon other premises would not decrease the net retail sales or the rental which we receive. Nevertheless, if the plaintiff chooses to set up a new farm store in Great Falls, Montana, it must pay us 2% on all sales made at said farm store. The alternative is to set the farm store up as an entirely separate store having no connection with the department store on the leased premises. If there are any such connections between the two stores, we shall claim 2% of the farm store sales regardless of whether or not the particular connection has any effect upon the net retail sales of the department store. If the plaintiff desires to set up a farm store, it cannot take advantage of any of the economies which it could obtain by using the facilities which are already set up in the department store. This is true whether or not those economies in any way decrease our rent or the net retail sales. If the plaintiff uses the "Gamble's Store" name, we shall want our 2% regardless of where the merchandise is actually stored and sold. We shall want our 2% if the farm store uses any of the accounting or bookkeeping services now set up in the department store. We shall want our 2% if the farm store uses the petty cash which is now available in the department store. We shall want our 2% if the farm store deposits its money in the same bank account as we use although all the money ultimately goes to the same destination. We shall want our 2% if a customer comes into the store in response to a newspaper

advertisement regarding the farm implements even though this would indirectly increase the net retail sales of the department store. In short, if the plaintiff uses any of the facilities of the department store for the benefit of the farm store, we shall claim that they are the same store and shall demand our 2% although we have made no claim and produced no evidence that these activities decrease the net retail sales of the department store."

B. SINCE DECEMBER 27, 1943 THE PARTIES THEMSELVES HAVE PLACED A PRACTICAL CONSTRUCTION UPON THE LEASE TO THE EFFECT THAT FARM SALES ARE NOT INCLUDED WITHIN THE RENTAL PROVISIONS OF THE LEASE.

The general rule on this matter is given in 32 Am. Jur., Landlord and Tenant, Sec. 127, as follows:

"Indeed, where the parties to a lease have placed a given construction upon the ambiguous provisions thereof and have governed their conduct in accordance with their construction, such construction will be given great weight and should, ordinarily, control the interpretation of the contract by the Court."

(See also Earp v. Mid-Continent Petroleum Corp. 167 Okla. 86, 27 Pac. (2d) 855, 91 A.L.R. 188)

In Musselshell Valley Farming & Livestock Co. v. Cooley (1929) 86 Mont. 276, 283 Pac. 213, the Court said, in part:

"Moreover, where parties to a contract of doubtful or ambiguous meaning have placed a particular interpretation upon it, that interpretation is one of the best indications of their true intent.

(Butte Water Co. v. City of Butte, 48 Mont. 386, 138 Pac. 195)"

In this connection we believe the case of In re Diversey Bldg. Corp. 90 F (2d) 703, 34 Am. Bankr. NS 437, is in point. That case involved a percentage lease of an apartment hotel. The lessee had been permitting employees to occupy certain apartments in the hotel and had not charged rent to those employees. The lessee had not accounted as income the rental which would have been paid on such apartments and had paid no percentage on the same to the lessor. The lessor had knowledge of this situation and had continued to deal with the lessee for nearly three years thereafter without objection. The Court held that the parties themselves had placed a **practical construction** upon their lease to the effect that the rental of these apartments was not included within the percentage provision of the lease. The Court said in 90 F (2d) at page 707:

"------ that at all times the lessor or appellee had full opportunity to examine the books and the building and exercised that right many times, and had knowledge, or by the exercise of reasonable care could have had knowledge, that appellant's employees were occupying the seven apartments without paying rent thereof and that appellants had never accounted for such rentals in their reports. Under such circumstances we are unable to conceive why the parties should not be considered as having construed for themselves. In any event, with full knowledge of the facts and making no objection to the reports within thirty days as provided by the lease, we know of no reason why appellee at this late date, in violation

of the lease, should be permitted to question the reports in this respect or to construe the contract differently from that construction the parties had previously placed upon it."

1. PLAINTIFF HAS DEMONSTRATED ITS PRACTICAL CONSTRUCTION OF THE LEASE IN THE MANNER OF SETTING UP AND OPERATING THE FARM STORE.

We don't think that there is any argument but that the plaintiff at least placed the construction that the farm store was not included under the lease in question. The evidence showed that the plaintiff had a general policy in setting up its eighteen farm stores. (R 168 et seq.) The Great Falls farm store was one of the eighteen so set up and was in accord with the general policy. That policy was to set the farm stores up on a separate basis and have them pay a flat rental rather than a percentage rental. The evidence also shows that the plaintiff had a policy never to pay a percentage rental in excess of 2½ per cent and that if the percentage rental applied on farm store sales, the actual percentage being paid by the plaintiff would amount to 4.68 per cent on farm store sales. (R 171 and 172)

If there were any doubt upon the plaintiff's construction on this matter, it would be eliminated by an examination of the correspondence written by the plaintiff to the defendant. Part of that correspondence is contained in plaintiff's Exhibit No. 21, beginning at page 326 of the Record. That letter,

written from the plaintiff to the defendant on the approximate date of April 8, 1946, provides in part:

> "The only item different than your suggestion is the one regarding a percentage on sales in the warehouse and lot, and our Merchandising Department objects very strenuously to this. I also feel that is an item differring entirely from our original program and really not applicable in this case. I feel that you and Chet will see the reasonableness of this."

Additional correspondence on the same matter is contained in a letter from the plaintiff to the defendant, dated July 9, 1946, and is part of the defendant's Exhibit No. 16. This letter may be quoted in part as follows: (R 236)

> "Regarding the lease on the lot and warehouse at the rear. **The company has stood firm against a percentage arrangement on the lease.** As originally mentioned, the rental was to be $60.00 a month and we did not have any mention of the percentages sales that I was aware of. However, Chet, I do not wish to be arbitrary and I will recommend to the company a flat rental of $75.00 a month, running concurrent to this main lease. If this meets with your and Ben's approval, I will prepare the lease and send it to you." (Emphasis supplied).

The point here is that throughout the entire correspondence the plaintiff made it quite clear to the defendant that under the plaintiff's construction of the lease of December 27, 1943, there was no obligation on the part of the plaintiff to pay a percentage rental on farm store sales.

If the evidence went no further, we feel that

the Court would be placed in the position of determining whether or not the plaintiff's or the defendant's construction of the lease was the most reasonable. However, as we shall see below, the defendant knew of the plaintiff's construction and in certain respects acceded to that construction.

2. THE DEFENDANT HAS ACCEDED TO PLAINTIFF'S CONSTRUCTION BY ITS PERMISSION OF THE PLAINTIFF'S ACTS AND BY THE INTERCHANGE OF LETTERS RELATING TO THE LEASE OF THE FARM STORE PREMISES.

Early in 1946, the defendant knew that the plaintiff was contemplating the sales or was actually making sales of farm equipment from the lot and warehouse behind the department store and not included in the lease of December 27, 1943. In view of the last two quoted letters to the defendant from the plaintiff, there can be no question but that the defendant knew that the plaintiff would not sign a percentage lease on the lot and warehouse where the farm store items were sold. The plaintiff has been consistent in that stand and has never changed.

It is not known exactly when the defendant knew that it was not receiving a percentage of the farm sales. Undoubtedly, the interchange of letters regarding the lease of the lot and warehouse should serve as notice to the defendant that the plaintiff was not going to pay a percentage of farm sales

sold on the lot and warehouse. At any rate, it is unquestioned that at least by the summer of 1948, the defendant knew that the plaintiff was not paying a rental upon farm sales sold at that lot and warehouse. (R 261 and 267). In fact, the defendant was able to obtain the exact amount of the farm sales. (R 190).

Under these circumstances, the defendant, knowing the plaintiff's position and interpretation of the lease of December 27th regarding farm sales, could have refused to lease the vacant lot and warehouse and forced a decision on this matter. But it did not. Instead, the defendant wrote to the plaintiff as of May 28, 1946: (R 322 and 323)

> "If you wish to prepare a new lease, and without delay, covering both properties, increasing the minimum by the $60.00 per month and including all sales, whether from the original store premises, the vacant ground or the warehouse building, under the percentage agreement, **we will still stick with our original understanding.** This would be in your favor, as you consistently report sales at less than your minimum and would thereby allow you a slack of an additional $720 per year to build up to before any excess becomes effective. **As the matter now stands,** this letter serves as a notice that you have the warehouse lot and vacant ground on **a month to month basis only and that upon due notice, we may sell or make other disposition of the property in question.**" (Emphasis supplied).

It can be pointed out that the above quoted letter was written May 28, 1946, before the defendant actually knew that it was not receiving a percentage

on the farm sales. However, the point is that even after the defendant did know that it was not receiving such a percentage, it continued to rent to the plaintiff and to collect the flat rental, in effect, acceding to the plaintiff's interpretation that the farm sales were not included within the percentage provision of the lease.

We feel that it is important that the defendant felt that it could and did change the terms of the rental on the vacant lot and warehouse. As of June 8, 1948, when the defendant almost certainly knew that it was not receiving a percentage on farm sales, the defendant advised the plaintiff by letter. (R 324)

> "This is to advise you that beginning August first next, the rental on the warehouse property, together with the vacant ground adjoining, all being Lot 5, Block 316, Great Falls, Montana, is hereby increased to $90.00 instead of $60.00 monthly as heretofore."

If the defendant had not wanted to accede to the plaintiff's consistent stand that the farm sales on this lot and warehouse were not to be included within a percentage basis, the defendant had only to notify the plaintiff in the above quoted notice that the rental also included 2% of all sales on those premises. Or the defendant could have terminated the month to month lease. We think it extremely important that the defendant was attempting to rent the warehouse and vacant lot in two different ways. Insofar as the warehouse and vacant lot themselves were concerned, the defendant was

claiming a flat monthly rental which ultimately ended up at $90.00 per month. Insofar as sales on that particular lot were concerned, the defendant was demanding a 2% rental. In practical effect, the defendant was attempting to charge the plaintiff $90.00 per month more rent for a warehouse and vacant lot than the defendant was receiving from the department store premises on Central Avenue. This is true because the flat rental of $60.00 or $90.00 per month was not included as a base prior to the time that the percentage rental applied. Thus, although defendant with its words was requesting an interpretation that the 2% of farm sales should be paid in accordance with the lease of December 27, 1943, the defendant's actions belied its words. For, by its actions, the defendant was accepting a flat rental and was not allowing the plaintiff any increase in the base before the percentage rental applied. By a base, we refer to the fact that the lease of December 27, 1943, provides that the net retail sales must exceed $270,000.00 before the 2% applies. The $270,000.00 is the base and 2% of that is the guarantee rental of $5,400.00 per year. If defendant had been consistent, it would have increased that base upon the rental guarantee. In other words, upon a rental of $90.00 per month or $1,080.00 per year, the base should be increased by $54,000.00 which would be added to the $270,000.00 prior to the time that the percentage rental would apply. This suggestion is contained in the

above quoted letter written from the defendant to the plaintiff on this same subject matter, dated May 28, 1946, at page 323 of the Record. If the plaintiff had acceded to this suggestion of the defendant, it would have saved itself the amount of the flat monthly rental if the defendant's theory here prevails. Since the plaintiff did not acceded to the defendant's suggestion and insisted on paying only the flat monthly rental, we submit that the defendant then acceded to the plaintiff's interpretation by accepting such flat monthly rental and that it cannot now belie its own actions and in addition, insist upon a percentage on such sales.

II. IF THE PLAINTIFF IS IN DEFAULT UNDER THE TERMS OF THE LEASE OF DECEMBER 27, 1943, THE PLAINTIFF IS ENTITLED TO RELIEF FROM FORFEITURE AND TERMINATION OF THAT LEASE, NOT ONLY BY THE TENDER MADE ON MARCH 6, 1951, BUT ALSO BY THE TENDER MADE DURING THE NEGOTIATIONS FROM OCTOBER 24 TO OCTOBER 28, INCLUSIVE, IN 1949, THE TENDER MADE IN THE PLAINTIFF'S COMPLAINT, AND THE TENDER BY THE PLAINTIFF'S REPRESENTATIVE. (Specifications of Errors, numbers 7, 8, and 9.

The District Court stated in its opinion that the defendant did not win in respect to its claim of forfeiture and gave the reasons therefor. (R 39 to 43) The Court also made a Finding of Fact

No. XI. as follows:

> "By reason of such offer and agreement, and under the provisions of Section 17-102, Revised Codes of Montana, 1947, the Court finds that plaintiff is entitled to be relieved from its defaults, as aforesaid, and from a termination and forfeiture of said lease, provided that plaintiff make full compensation to defendant as alleged and agreed, in the amounts and within the time hereinafter set forth." (R 54-55)

Thereafter, the Court made its Conclusion of Law, No. V. on Page 57 of the Record:

> "Judgment shall not be entered herein until after the expriation of fifteen (15) days from the entry of these Findings and Conclusions, during which period plaintiff may, if it so elects, make the payments to defendant required under these Findings and Conclusions, and the Court hereby retains jurisdiction of the cause for the purpose of entering a proper judgment upon the expiration of such period."

The Conclusions of Law were filed February 24, 1951. On March 6, 1951, plaintiff made a tender of payment, which tender was acknowledged and refused. (R66) The Judgment of the District Court was filed and entered on March 14, 1951. (R 58 to 60). Paragraph 3 of that judgment provides in part:

> "3. That by the tender on March 6th, 1951, of the sum of $6,305.20, representing unpaid rental plus interest and the cost of this suit, with interest on all of said sums from February 24th, 1951, to March 6th, 1951, at six per cent per annum, the plaintiff is entitled to, and hereby is, relieved from the termination and forfeiture of said lease by reason of the aforesaid defaults----"

This part of the judgment was appealed from by the defendant. (R 60)

Thus the plaintiff has been allowed its relief from forfeiture by the District Court. If this Court upholds the District Court upon the same grounds, the plaintiff has no reason to argue further on this matter. However, if the defendant should prevail in its contention that the District Court erred on these grounds, the plaintiff does not want to be put in a position of abandoning other reasons to reach the same decision.

We realize that the subject of forfeiture will be discussed at length in the defendant's original brief on appeal and in our answer brief. To avoid repetition, we will treat this matter very briefly at the present time to indicate that we have not abandoned the position set up by the Designation of Points to be relied upon on Cross-Appeal, numbered 7, 9, and 10.

A. SECTION 17-102, REVISED CODES OF MONTANA, 1947 APPLIES TO THIS CASE.

Section 17-102, R. C. M. 1947 provides:

> "**Relief in case of forfeiture.** Whenever, by the terms of an obligation, a party thereto incure a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, wilful, or fraudulent breach of duty."

This statute was cited by the Court in its opinion (R 41). We cite it again here because we submit

that an examination of all of the evidence relating to the compromise negotiations of October 24th to 28th, inclusive, in 1949, will demonstrate that there was a tender then within the terms of this statute.

B. THE GENERAL PRINCIPLES OF EQUITY REQUIRE SUCH A RELIEF FROM FORFEITURE.

These general principles of equity are discussed somewhat by the District Court in its opinion regarding relief from forfeiture. (R 42 and 43) We anticipate that we shall have to deal with this subject at great length in our answer brief to defendant's appeal. We mention it at this time because we submit that all of the following facts bring us within those general principles: The tender made during the negotiations from October 24th to October 28th, 1949, the tender made in plaintiff's complaint, the tender made by plaintiff's representative at the time of the trial, and the tender made after the judgment, on March 6, 1951.

The District Court, in its opinion, ordered that all evidence relating to the effort to effect a compromise should be excluded from the case. (R 36) As we have indicated above, we cannot tell whether that order excludes the evidence of the offer made by the plaintiff to the defendant during the negotiations from October 24th to October 28th, 1949, of full compensation. If the order is so interpreted, we submit that the District Court is in error. We

submit the citations in the Record on Page 36, of R.C.M. 1947, 93-2201-3 is in error and that the correct citation is R.C.M. 1947, 93-2201-5, which deals with a compromise offer. In interpreting that statute, the Supreme Court of Montana said in Lenahan v. Casey, 46 Mont., 367, 128 Pac., 601, that:

> "Even if it be conceded that the stipulation was an offer of compromise and was conditionally accepted as such, the declaration to the effect that the partnership was still in existence was not essential for the purpose of the compromise, and is not to be regarded as a concession made in order to effect it. This feature of it is the recital of an independent fact and is not within the rule of the statute (Rev. Codes, sec. 8040), that "an offer of a compromise is not an admission that anything is due." (Rose v. Rose, 112 Cal. 341, 44 Pac. 658; Kutcher v. Love, 19 Colo. 542, 36 Pac. 152;)"

III. THE DEFENDANT HAS WAIVED ITS RIGHT, IF IT EVER HAD ANY, TO CLAIM A 2% RENTAL ON FARM STORE SALES. (Specifications of Error, number 11)

The District Court stated in its opinion that there was no waiver in this case on the part of the defendant. (R 40-41) The District Court accordingly made the following Finding of Fact:

> "IX. The defendant has not waived the defaults of the plaintiff, aforesaid, and was on October 3rd, 1949, and at all times thereafter entitled to terminate said lease by reason thereof." (R 54)

The District Court was apparently considering the question as to whether or not there was a waiver

on the part of the defendant of its right to terminate the lease. In this argument the plaintiff now submits that the defendant has waived its right to claim a two per cent rental on farm store sales. This is another aspect of the element of waiver. However, since the general rules of waiver apply to both cases, in order to avoid duplication, we shall discuss the law relating to waiver in this case below under the subject of the waiver of the right to forfeiture.

A. DEFENDANT CONTINUED TO CASH THE PERCENTAGE RENTAL CHECKS AND THE OTHER MONTHLY RENTAL CHECKS AFTER DEFENDANT HAD KNOWLEDGE THAT THE FARM STORE SALES WERE NOT INCLUDED.

The evidence is uncontradicted that the defendant repeatedly and without exception cashed all of the regular monthly rental checks and all of the percentage rental checks, even after it had knowledge that these rental checks did not include two per cent on farm store sales. The plaintiff submits that by so doing the defendant waived its right thereafter to claim a two per cent rental on the said farm sales.

B. DEFENDANT CONTINUED TO RENT THE PROPERTY TO THE PLAINTIFF ON WHICH THE FARM STORE SALES WERE MADE AFTER THE DEFENDANT HAD KNOWLEDGE THAT IT WAS NOT RECEIVING THE 2% RENTAL ON SUCH SALES.

As we have already pointed out, the defendant knew, on May 28, 1946, and on June 8, 1948, that the plaintiff was using the warehouse and vacant lot for farm sales. On both of those dates, the defendant advised the plaintiff that the rental of that lot and warehouse was upon a flat rental basis. (R 321 and 324) We submit that, as pointed out above, that is a practical interpretation of the lease of December 27, 1943. However, if it is not such an interpretation, we submit that it is a waiver of any right the defendant may have had to require the plaintiff to pay a percentage on the farm sales made at the warehouse or the vacant lot. Unquestionably, the plaintiff was entitled to assume that such rental would be on a flat monthly basis. If the plaintiff had not so assumed, it would have been able to have saved the flat monthly rental by going in on a percentage arrangement and increasing the base prior to the time the percentage applied as hereinabove set forth.

IV. THE DEFENDANT HAS WAIVED ITS RIGHT, IF IT EVER HAD ANY, TO CLAIM A TERMINATION AND FORFEITURE OF THE LEASE OF DECEMBER 27, 1943. (Specifications of Error, number 12)

The general rule on waiver is set forth in 32 Am. Jur., Landlord and Tenant, at Section 882, as follows:

> "Generally speaking, any recognition by a lessor of a tenancy as subsisting after a right of entry has accrued where the lessor has notice of the

forfeiture, will have the effect of a waiver of the landlord's right to a forfeiture of the leasehold. Slight acts on the part of a lessor may be sufficient."

To the same effect is 51 C.J.S., Landlord and Tenant, Section 117 (2), at Page 704, et seq.

In Woollard v. Schaffer Stores Company, Inc., 272 N. Y. 304, 5 N.E. (2d) 829, 109 A.L.R. 1262, the acceptance of rent after the violation of the terms of the lease is involved. In that case the tenant violated the lease by sub-letting and by making alterations without the landlord's permission. The landlord served written notice that he elected to terminate the lease. Thereafter the landlord cashed various checks written by the tenant which checks purported to be in payment of monthly rents. Most of the endorsements by the landlord were "subject to litigation pending." There followed a suit for a declaratory judgment and the New York Court of Appeals said in 109 A.L.R., at Page 1265:

"We agree with the appellate division that acceptance of rent by the landlord, after the acquisition of knowledge by him of the violation of the terms of the lease in subletting without the landlord's written consent constitutes a waiver of the forfeiture. (Cases cited). The same rule applies in respect to the other violations."

A. THE DEFENDANT CONTINUED TO ACCEPT AND CASH ALL RENTAL CHECKS AFTER IT HAD KNOWLEDGE THAT FARM STORE SALES WERE NOT INCLUDED. OF SPECIAL IMPORTANCE IS THE FACT THAT THE DE-

FENDANT ACCEPTED AND CASHED THE CHECK OF OCTOBER 3, 1949.

In our instant case there is no argument but that the monthly rental checks of $450.00 per month were paid promptly and satisfactorily up to and including the month of October, 1949. Nor has there been any denial by the defendant that the amounts reported as due the defendant as two per cent of the net retail sales have been paid by the plaintiff and accepted by the defendant. The only amount claimed by the defendant through October 19, 1949, was the sum of $5161.60, which was the figure accepted as correct as being two per cent of the farm sales. The monthly rental check for the month of October, 1949, was comparable to the other rental checks which the defendant had received from the plaintiff for the premises involved in the lease of December 27, 1943. That check is set forth as plaintiff's Exhibit No. 22 at page 334 of the Record and contains a designation that it is a rent check and also indicates the month in which it was written. Defendant's president testified that he made no objection to the receiving of this October rent. (R 336). It was stipulated that that October rent check was deposited in the Montana Bank and Trust Company on October 5, 1949, as is indicated by plaintiff's Exhibit No. 24. (R 338-339) . The entire examination of this line of evidence indicates that the defendant received and accepted all of the rental checks for the monthly pay-

ments up to October, 1949. In addition thereto it received and accepted the percentage checks which were tendered it. It is particularly noteworthy that the rental check for October, 1949, was cashed on October 5, 1949, just two days after the notice of termination was given to the plaintiff.

In this connection, we believe that defendant's Exhibit No. 26, which is set forth in the Record, beginning at page 348, is in point. That is a letter to the plaintiff from the defendant, dated March 30, 1949. Among other things, that letter identifies two checks and it may be quoted in part as follows:

> "We are crediting your account with the checks in question as being simply payments on account."

As far as we can determine from the evidence, subsequent checks were received by the defendant without objection. At any rate, the defendant's president testified as follows regarding the October rental check, which was cashed or deposited on October 5, 1949, (R 333-336).

> "Q. Did you ever make any objection to the receiving of the October rent? Did you ever make an objection to receiving this check which is Plaintiff's Exhibit No. 22?
>
> A. No.
>
> Q. After you deposited that check did you ever return the $450.00?
>
> A. No."

A similar situation was presented in the case of Miller v. Reidy, 260 Pac. 358. In that case there

was a provision in a written lease against sub-letting. The lessee violated that provision and received a notice from the lessor that the lease had been violated and made a demand for possession. The tenant did not surrender possession and continued to pay rent in advance, which the lessors accepted. The Court said that in 260 Pac. at page 360:

> "If the assignment were to be regarded as a breach of the lease, the evidence is sufficient to support the finding that the right to take advantage of such breach was waived by the lessors. It is true that in accepting each month's rent from Reidy, Dr. Miller executed a receipt in the following language:
>
> > 'Received from P. M. Reidy $300 for rent of premises at 1140 So. Figueroa St., for the month of (inserting date) without prejudice to any of my rights under the lease of said premises.'
>
> This was a clear attempt to eat the cake and still keep it. His actions belie his words. Waiver is a question of intention. For the lessors month after month to accept rents specified in the lease, and at the same time declare that there was a forfeiture, results in an irreconcilable inconsistence."

(See also an annotation in 109 A.L.R. at page 1267 and especially at 1287 on the Effect of a Qualified Acceptance, and Batley v. Dewalt, 56 Wash. 431, 105 Pac. 1029).

B. THE DEFENDANT CONTINUED TO LEASE THE PROPERTY TO THE PLAINTIFF ON WHICH THE FARM STORE SALES WERE MADE AFTER THE DEFENDANT HAD

KNOWLEDGE THAT IT WAS NOT RECEIVING 2% RENTAL ON SUCH SALES.

The facts of this continued rental have already been gone into at great length above under the discussion of the practical construction of the contract. We feel that it would serve no purpose to go into the facts again at this time. Plaintiff, therefore, submits, that this continued rental comes within the general principles of waiver, elsewhere discussed.

C. PLAINTIFF DEMANDED A PERCENTAGE RENTAL ON FARM STORE SALES UP TO THE DATE OF OCTOBER 19, 1949, WHICH COULD ONLY BE OWING IN THE EVENT THE LEASE OF DECEMBER 27, 1943 WAS STILL IN EFFECT AS OF OCTOBER 19, 1949.

On October 3, 1949, the defendant sent the plaintiff a notice that the lease was terminated, which notice is set forth as Exhibit B in the complaint, (R 23-24) and admitted to be such in the defendant's answer. (R 29) If that notice did not terminate the lease, then the lease was not terminated, for the defendant sent the plaintiff no other purported notice of termination. Thereafter, from October 24th to October 28th, 1949, there were a series of negotiations between the plaintiff's representatives and the defendant's representatives. During these periods of negotiation the figure of $5161.60 represented two per cent of the farm

sales up to the date of October 19, 1949. Chester McNair, President of defendant, testified as follows in response to questions from his own counsel: (R 300)

> "Q. Was there any further discussion in that meeting, Mr. McNair, with reference to the $5,-161.60 representing the percentage on the farm sales?
>
> A. They said, they or one of them said it was correct to the best of their belief, it might vary a dollar or two or a few dollars, and if further search of the records disclose that, it would be rectified, and we said for all intents and purposes we would accept that figure, meaning that figure was authentic and we would also accept that amount in settlement."

On redirect examination by his own counsel, Mr. McNair further testified: (R 345)

> "Q. And was that amount accepted by you in settlement of the percentage rentals upon the farm sales? A. Yes.
>
> Q. For the period 1947, 1948 and 1949 down to October 19th? A. Yes."

The date of October 19, 1949 was sixteen days after the date of the purported termination of the lease, October 3, 1949. An examination of all of the evidence pertaining to the negotiations will show that during the period of time from October 24th to October 28th, 1949, the defendant continually demanded the sum of $5161.60. This represented two per cent of the farm sales down to the date of October 19th, 1949. **This sum of $5161.60 could only be due and owing the defendant in the event**

the lease of December 27th, 1943 was still in effect as of the date of October 19th, 1949.

MISCELLANEOUS

The plaintiff herewith abandons number 11 of its Designation of Points to be relied upon on cross-appeal, which is concerned with whether or not the District Court retained jurisdiction for the purpose of determining whether or not the plaintiff was obligated to pay the defendant a reasonable attorney fee.

Designation of Points, numbered 12, which is Specification of Error number 10, is a contention that the judgment of the District Court is erroneous in adjudging that the defendant recover the costs of the action below. Plaintiff contends that if the plaintiff prevails in its appeal that the plaintiff should automatically be relieved from the payment of costs below.

Plaintiff also contends that the tender made by the plaintiff during the negotiations from October 24th to October 28th, 1949 brings the plaintiff within the provisions of Section 93-8609, Revised Codes of Montana 1947, which provides:

> "**Cost when a tender is made before suit brought.** When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court for plaintiff the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant."

A case in point in interpreting this statute is Luebben v. Metlen (Montana 1940) 110 Mont. 350, 100 Pac. (2d) 935.

Designation of Point on Cross-Appeal, number 8, was not discussed in this brief. That point was designated by the plaintiff to indicate that despite the refusal of the defendant to accept the plaintiff's tender of March 6, 1951, and despite the appeal of the defendant, the plaintiff at all times has been, and still is, ready, willing and able to pay to the defendant the full amount of principal, interest and costs and to do all that that law and equity requires to prevent a forfeiture and termination of the lease of December 27, 1943.

We respectfully submit that the District Court erred as heretofore assigned and that the judgment appealed from on this cross-appeal should be reversed.

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SERVICE admitted this 24th day of August, 1951.

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